

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL STEVEN HOLDER,

Defendant-Appellant.

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UNPUBLISHED

September 16, 2003

No. 238501

Bay Circuit Court

LC No. 00-001271-FH

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of sexual penetration with an uninformed partner by a person infect with acquired immunodeficiency syndrome (AIDS), MCL 333.5210, for which he was sentenced to 80 to 120 months' imprisonment. We affirm.

I. Ineffective Assistance of Counsel

Defendant first argues that defense counsel was ineffective for failing to challenge five jurors for cause when they admitted their personal disapproval of, or concern with, interracial relationships.<sup>1</sup> "In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing." *People v Sabin (on Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000); see also *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Defendant failed to bring a motion for a *Ginther* hearing or for a new trial; therefore, this issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). In order to avoid forfeiture of this unpreserved issue, defendant must establish that an error occurred, the error was plain, i.e., clear or obvious, and the error affected defendant's substantial rights, i.e., the error affected the outcome of the trial proceedings. *Id.* at 761-764. To prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial, i.e., there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d

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<sup>1</sup> Defendant is African-American, while the victim is Caucasian.

694 (2000). Defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Id.* at 302. The effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999).

A defendant's right to a jury trial includes the right to a fair and impartial jury. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). In order to be excused for cause, a juror must have a demonstrated bias for or against a party, a state of mind that prevents the juror from rendering an impartial verdict, or opinions that would improperly influence the juror's verdict. *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000). The scope and conduct of voir dire is within the sound discretion of the trial court. *Sawyer, supra* at 186. On appeal, this Court must determine whether the trial court conducted a voir dire sufficiently probing to uncover potential juror bias. *Id.* at 187.

Defendant failed to show that counsel's performance was either deficient or prejudicial. "Defense counsel may have correctly assumed that challenges for cause would be properly denied and that unsuccessful challenges for cause would not be viewed favorably by the jury." *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986). Moreover, defense counsel's failure to challenge a juror may not form the basis for a claim of ineffective assistance of counsel. *Id.* at 95. Therefore, defense counsel's decision not to object for cause was not objectively unreasonable.<sup>2</sup> "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Accordingly, defendant has failed to demonstrate a plain error affecting his substantial rights.

## II. Recusal of Trial Court

Defendant next argues the trial judge prejudged defendant because he previously sentenced defendant on a separate charge in 1993, where he warned defendant that if he got out and committed another felony, he could possibly be facing life imprisonment. We disagree.

"A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which . . . [t]he judge is personally biased or prejudiced for or against a party or attorney." MCR 2.003(B)(1). MCR 2.003 requires proof of actual bias and, under MCR 2.003(B)(1), a showing that the judge is personally prejudiced or biased before a judge may be disqualified under this section. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). "Bias or prejudice has been defined as 'an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes.'" *Id.* at 495 n 29. Judicial impartiality is presumed and the defendant bears a heavy burden of proving otherwise. *People v Coones*, 216 Mich App 721, 727; 550 NW2d 600 (1996). Moreover, "judicial rulings alone almost never constitute [a] valid

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<sup>2</sup> Nor was it prejudicial since each of the jurors at issue specifically testified that they could set aside their personal beliefs about interracial marriages and employ the guilty beyond a reasonable doubt standard to defendant, who they all presumed was innocent.

basis for a bias or partiality motion.” *Cain, supra* at 496, quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994).

During the motion for disqualification, the chief judge found the only contact the trial judge had with defendant was as the judge at a previous sentencing. The court held that merely advising a defendant on the record that he may be subject to a life sentence if he committed another felony is not a reflection of any individual bias that would rise to a level requiring a judge to disqualify himself. We agree with the chief judge, and conclude that defendant failed to overcome the presumption of impartiality as the one statement made on the record did not reveal a bias against defendant on the part of the trial judge. *Cain, supra*.

### III. Sentencing

Defendant’s final argument is that the trial court erred in exceeding the sentencing guidelines on remand.<sup>3</sup> In regard to departures from the legislative sentencing guidelines’ range,<sup>4</sup> the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion. *People v Babcock*, \_\_\_ Mich \_\_\_, 666 NW2d 231 (Docket No. 121310, issued July 31, 2003), slip op at 18. See also *People v Lowery*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 240001, issued August 21, 2003), slip op at 1-2.

A trial court may depart from the statutory guidelines only if it finds a substantial and compelling reason for the particular departure and states that reason on the record. MCL 769.34(3); see also *Babcock, supra* at 8-11; *Lowery, supra* at 2. As our Supreme Court recently explained in *Babcock*, quoting in part from *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995):

[A] “substantial and compelling reason” must be construed to mean an “objective and verifiable” reason that “‘keenly’ or ‘irresistibly’ grabs our attention;” is “of ‘considerable worth’ in deciding the length of a sentence;” and “exists only in exceptional cases.” *Babcock, supra* at 9.

The trial court’s reason or reasons for a departure, as indicated by the *Babcock* Court, must be based on objective and verifiable factors. *Id.* at 8-10. Objective and verifiable factors are those that are external to the minds of the judge, defendant, and others involved in making the

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<sup>3</sup> Defendant’s argument that the trial court erred in sentencing him to a minimum sentence of 120 months, more than twice the sentencing guideline range of fourteen to fifty-eight months, is moot because this Court remanded the case for resentencing and the resentencing was the relief defendant requested in his initial brief on appeal. *People v Greenberg*, 176 Mich App 296, 302-303; 439 NW2d 336 (1989).

<sup>4</sup> Because defendant committed this offense in April 2001, the legislative sentencing guidelines applied. MCL 769.34(2).

decision, and are capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003); *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

As previously stated, in reviewing the trial court's determination that substantial and compelling reason(s) exist warranting a departure, we are to apply an abuse of discretion standard. *Babcock*, *supra* at 18. The *Babcock* Court, recognizing as did the Legislature that trial courts are optimally situated to determine an appropriate sentence, held that "[a]n abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [a] principled range of outcomes." *Id.* at 23. This formulation recognizes that "[a]t its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Id.* Therefore, if the trial court chooses one of the reasonable and principled outcomes, no abuse of discretion has occurred. If, however, the trial court's choice falls outside of what is considered a reasonable and principled outcome, an abuse of discretion has occurred. *Id.*<sup>5</sup>

The trial court cited two reasons for departing above the guidelines: (1) the potential life threatening disease given to the victim's child, and (2) the potential exposure of the life threatening disease to other people through the innocent transmission by the victim. The trial court summarized its findings as follows:

As indicated, the Court has taken into account the life-threatening nature of HIV to the victim . . . . But the guidelines only take into account the life-threatening disease to the victim. The guidelines do not take into effect (sic) the potential life-threatening disease to [the victim's child]; also the potential exposure to a host of other people, depending on the circumstances; the potential spread from the victim to many sexual partners of [the victim] and, in turn, the spread of these persons having intercourse with other sexual partners and thereby spreading it even further.

In this case, defendant infected [the victim] some time during their relationship between April of 1999 and July of 1999. She didn't know she was infected with HIV until November of 1999 when she was pregnant. Now, we have the exact scenario that the Court described, i.e., the victim is infected; she exposes other sex partners; these partners in turn expose others; and [the victim] already exposed, now has a baby that is a potentially – is potentially exposed.

The bottom line is the guidelines are too low and inadequate for the dangerous nature of defendant's conduct and the potential life-threatening disease which exposes numerous persons, including other mothers, fathers, and babies.

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<sup>5</sup> As the Court noted, this standard of review falls in between de novo review and the very deferential abuse of discretion standard articulated in *Spalding v Spalding*, 355 Mich 382, 384-384; 94 NW2d 810 (1959). *Babcock*, *supra* at 23. In conducting this review, however, we must keep in mind "the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender." *Id.* at 24.

For these reasons, and compelling reasons, the Court believes it should deviate from the sentencing guidelines.

The fact that the victim's child, who was unborn at the time the victim was infected, could carry or later develop the HIV virus is an objective factor, as it is external to the minds of the court, defendant, and the prosecutor. *Hill, supra*. This fact is verifiable by any medical journal on the subject, and is commonly known. As the trial court noted, that fact is not taken into account under the guidelines. Additionally, the impact this could have on the life of the child is a factor that "keenly grabs" our attention. Regardless of whether the child actually has AIDS, the health of the child will have to be monitored throughout his or her life, which includes the attendant concern over how the results of those tests. Therefore, the trial court did not abuse its discretion in determining that this was a substantial and compelling reason that warranted an upward departure from the sentencing guidelines. *Babcock, supra*.

Similarly, the fact that the victim could transmit this deadly disease is objective and verifiable, as it is not based upon any subjective criteria. *Hill, supra*. Rather, the trial court took into account the fact that because of the way the disease can be transmitted, it is possible that other innocent victims could be infected because of defendant's original unlawful act with this victim. The guidelines do not take this into account, and as with the other factor articulated by the trial court, we conclude that this too was a substantial and compelling reason to impose the sentence above the guidelines. *Babcock, supra*. Accordingly, the trial court did not abuse its discretion in resentencing defendant.<sup>6</sup>

Affirmed.

/s/ David H. Sawyer  
/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray

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<sup>6</sup> Although defendant did not raise a proportionality issue, we independently conclude that this punishment "fits the crime" committed by defendant. *Babcock, supra*.